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No. 98 - 464

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1998

TOWN OF TRENTON,
Petitioner,

v.

LOUNGE MANAGEMENT, LTD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Wisconsin erred in finding the Town of Trenton's anti-nudity ordinance to be overbroad, in violation of the First Amendment to the United States Constitution, while refusing to apply an available and limiting construction of the ordinance that would have cured any substantial over breadth?

2. Whether 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495 (1996) is controlling case law in cases involving ordinances that ban public nudity in establishments licensed to sell alcohol?

3. How are cases that are a plurality decision, as compared to a majority decision, to be interpreted?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings in the Supreme Court of Wisconsin, in Case No. 96-1853, __Wis.2d.__, 580 N.W.2d 156 (1998), listed in the caption:

Town of Trenton

Lounge Management, Ltd.

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This case raises important issues of statutory and regulatory construction. The decision of the Supreme Court of Wisconsin is in conflict with the ruling of the United States Supreme Court in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495 (1996).

Respondent argues at page 10 of its *Respondent's Brief in Opposition*:

> Likewise, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), a situation identical to the instant case, in that it involved a facial overbreadth challenge of the First Amendment to a City ordinance, this Court stated: "In construing the St. Paul Ordinance, we are bound by the construction given to it by the Minnesota court." Id. at 381.

R.A.V. v. City of St. Paul is not a case involving nude dancing, but a case involving a prosecution under the Bias-Motivated Crime Ordinance of the City of St. Paul, Minnesota. That case specifically involved the burning of a cross on a black family's lawn. In that case, the trial court dismissed the charge on the grounds that the ordinance was substantially overbroad and impermissibly content-based. The Minnesota Supreme Court reversed the decision of the trial court, specifically rejecting the over breadth claim and basing its decision upon Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

This Court specifically rejected the interpretation of the ordinance by the Minnesota Supreme Court, stating: "We nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech

addresses." R.A.V. v. City of St. Paul, 505 U.S. 377 at 382.

This case is ripe for interpretation by the United States Supreme Court due to the fact that the Wisconsin Supreme Court relied solely upon the rulings of the United States Supreme Court and the United States Constitution in its determination that the Town of Trenton Ordinance was unconstitutional on the basis of overbreadth.

This matter is similar to R.A.V. v. City of St. Paul in that the Minnesota Supreme Court and this Court based their respective decisions on *federal*, not *state* law.

The Respondent argues this Court lacks the Constitutional authority to construe state statutes or municipal ordinances. Respondent ignores the fact that the basis for the decision of the Wisconsin Supreme Court rests solely upon the First Amendment to the United States Constitution. Lounge Management, LTD v. Town of Trenton. 219 Wis.2d 13, 15, 580 N.W.2d 156,157(1998).

> As noted by Justice Steinmetz, for the dissent: A regulation, therefore, should not be invalidated *in toto* for overbreadth unless it reaches "*a substantial number* of impermissible applications . . . ." New York v. Ferber, 458 U.S. 747, 771 (1982) (emphasis added). Simply conceiving of a single impermissible application of an ordinance

is not sufficient to succeed on an overbreadth claim. Id., 219 Wis. 2d at 169, 580 N.W.2d at 169.

The Wisconsin Supreme Court, in the majority opinion, cites no corresponding provision in the Wisconsin Constitution or in Wisconsin case law, as the basis for its decision.

CONCLUSION

The Supreme Court of Wisconsin committed error by finding the Town of Trenton Ordinance No. 10 unconstitutional, on the basis of being overbroad. This court has the authority to interpret the Ordinance, since the Wisconsin Court relied solely upon the United States Constitution and corresponding federal law. This Court is the appropriate forum and has the authority to interpret the actions of the Supreme Court of Wisconsin.

Respectfully submitted,

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